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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 368.

GEMSCO, INC., ET AL.,

Petitioners,

vs.

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR.**

No. 369.

MILDRED MARETZO, ET AL.,

Petitioners,

vs.

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR
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No. 370.

JOSEPHINE GUISEPPI, ET AL.,

Petitioners,

vs.

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION OF THE UNITED STATES DEPARTMENT OF LABOR.**

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

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INDEX.

Petition:	Page
I. Opinions of court below	2
II. Summary statement of matter involved	2
III. Jurisdiction of this court	3
IV. Statute involved	3
V. Questions presented	4
VI. Reasons for allowance of writs	4
Brief:	
I. Opinions of court below	11
II. Jurisdiction	12
Date of entry of order and decree to be reviewed	12
III. Statement of the case	12
IV. Specification of errors to be urged	12
V. Summary of argument	13
A. The Fair Labor Standards Act of 1938 did not, either expressly or impliedly, confer upon the Administrator the authority to make the wage order herein prohibiting homework	13
B. If the Act, by implication, intended to confer unrestrained power on the Administrator to prohibit industrial homework, there was an unconstitutional delegation of legislative power	13
C. The prohibition of industrial homework solely because of the Administrator's inability to enforce the wage rate as to homeworkers violates the Fifth Amendment of the Constitution	13
VI. Argument	13
A. The Fair Labor Standards Act of 1938 did not, either expressly or impliedly, confer upon the Administrator the authority to make the wage order herein prohibiting homework	13

	Page
1. The legislative history of the Act established Congressional intent to withhold from the Administrator the power to prohibit homework. The decision of the Court below to the contrary is in conflict with the applicable decisions of this Court.....	13-14
Brief statement of legislative history of Section 8 (f).....	14
2. The context of Section 8 (f) indicates that Congress did not grant authority to the Administrator to prohibit industrial homework as a "term and condition" of a wage order.....	17
B. If the Act, by implication, intended to confer unrestrained power on the Administrator to prohibit industrial homework, there was an unconstitutional delegation of legislative power.....	19-20
C. The prohibition of industrial homework solely because of the Administrator's inability to enforce the wage rate as to homeworkers violates the Fifth Amendment of the Constitution.....	22
Conclusion.....	23-24

TABLE OF CASES CITED.

<i>Boston Sand & Gravel Co. v. U. S.</i> , 278 U. S. 41, 48...	15
<i>Cudahy Packing Co., Ltd. v. Holland</i> , 315 U. S. 357, 366.	7, 15
<i>Currin v. Wallace</i> , 306 U. S. 1, 14.....	22
<i>Del Vecchio v. Bowers</i> , 295 U. S. 281, 285.....	6
<i>Fed. Land Bank of St. Paul v. Bismarck Lumber Co.</i> , 314 U. S. 95, 100.....	8, 17
<i>Keystone Mining Co. v. Gray</i> (CCA 3rd) 120 Fed. (2d) 1, 9-10.....	15
<i>Maurer v. Hamilton</i> , 309 U. S. 598, 613.....	7, 15
<i>North American v. Securities & Exchange</i> , 133 Fed. (2d) 148, 154. (Cert. granted 318 U. S. 750).....	22

INDEX

iii

	Page
<i>Opp Cotton Mills, Inc. v. Administrator</i> , 312 U. S. 126, 144.....	21
<i>Panama Refining Co. v. Ryan</i> , 293 U. S. 388, 417, 418, 430.....	8, 21
<i>Penn. R. R. Co. v. International Coal Mining Co.</i> , 230 U. S. 184, 198.....	7, 15
<i>Phelps Dodge Corp. v. National L. R. B.</i> , 313 U. S. 177, 189.....	8, 17
<i>Schechter v. U. S.</i> , 295 U. S. 495, 529-530, 537, 539-540.....	8, 21
<i>U. S. v. Delaware & Hudson Co.</i> , 213 U. S. 366, 414.....	7, 15, 16
<i>U. S. v. Wrightwood Dairy</i> , 315 U. S. 110, 119.....	22
<i>Wickard v. Filburn</i> , 317 U. S. 111, 124.....	22
<i>Yackus v. U. S.</i> , 64 Sup. Ct. 660, 667.....	21

STATUTES CITED.

Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925 (U. S. C. Title 28, Section 347 (a)).....	3, 12
Section 243 of the Judicial Code.....	12
Fair Labor Standards Act of 1938 (U. S. C. Title 29):	
Section 2.....	21
5.....	2
6.....	6, 17, 18
8.....	2, 3, 4, 12 14, 17, 18
10 (a).....	3, 12
3 (1).....	19

CITATIONS OF CONGRESSIONAL RECORD

Vol. 82, Part 2, pages 1511, 1514, 1574, 1583.....	7, 14
Vol. 83, Part 7, pages 7373, 7376.....	7, 14
Vol. 83, Part 7, pages 7378, 7373.....	14
Vol. 83, Part 7, page 7389.....	14

MISCELLANEOUS CITATIONS

Joint Hearings Before the Committee on Education and Labor in the Senate, and the Committee on Labor, House of Representatives. 75th Congress, 1st Session S. 2475 and H. R. 7200, pages 184, 195..	7, 15
---	-------

	Page
Annual Report, Wage and Hour and Public Contract Division, U. S. Department of Labor: For the Fiscal Year Ending June 30, 1943, page 43.....	20, 23
For the Fiscal Year Ending June 30, 1941, page 106....	20
Constitution of the United States:	
Fifth Amendment.....	6, 7, 22
Article I, Section 8.....	6, 7, 22

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**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

*To the Honorable Harlan F. Stone, Chief Justice, and the
Associate Justices of the Supreme Court of the United
States:*

The petitioners, Josephine Guiseppi, et al., Mildred Maretzo, et al., and Gemsco, Inc., et al., comprising both home-workers and employers in the embroideries industry (R. 2, 8, 23), jointly pray that writs of certiorari issue to review the orders and decrees of the United States Circuit Court of

Appeals for the Second Circuit, filed in the above proceeding on July 27th, 1944 (R. 246-247-248), which orders and decrees affirmed, by a divided Court, the wage order for the embroideries industry, dated August 21st, 1943, issued by the Respondent (R. 34-39).

I. Opinions of the Court Below.

Three separate opinions were rendered by the Court below as to the Administrator's authority to issue a wage order prohibiting the performance of homework in the embroideries industry. Circuit Court Judges Jerome N. Frank and Learned Hand, for different reasons, upheld the Administrator's order (R. 211-241; 241-243), and Judge Thomas W. Swan, in a separate opinion, dissented (R. 243-246).

The opinions have not yet been printed in the Official Reports.

II. Summary Statement of Matter Involved.

The matter involves a wage order issued by the Respondent which (1) approves the forty cent minimum hourly wage rate for the embroideries industry recommended by an industry committee acting under Sections 5 and 8 of the Fair Labor Standards Act of 1938, and (2) in addition, prohibits, with limited exceptions, the employment of homeworkers in the said industry (R. 34-39).

The petitioners, during the entire course of this proceeding, have only challenged the statutory and constitutional authority of the Respondent to include in the said wage order the latter provision relating to the prohibition of homework (R. 42-44).

The prohibition of homework was included in the wage order by the Respondent solely because he found that he could not enforce the minimum wage rate as to the homeworkers employed in the industry (R. 141-142).

The Administrator found that between 8,500 and 12,000 homeworkers located in various parts of the nation and constituting approximately one-third of all the employees in the embroideries industry, will be affected by the terms of this prohibition (R. 84-86). He also found that forty per cent of the employers engaged in the industry depend exclusively upon homeworkers (R. 143-146).

The Administrator's prohibition of homework expires on October 23rd, 1945, when all administrative wage orders automatically become ineffective under Section 8 (e) of the Fair Labor Standards Act.

The petitioners herein filed three separate petitions for review in the Court below pursuant to Section 10 (a) of the Fair Labor Standards Act (U. S. C. Title 29, Section 210 (a)) (R. 1-32). By order of that Court the three petitions were consolidated, and a stay of execution of its order and decree was granted pending the disposition of the petition herein by this Court.

III. Jurisdiction of This Court.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925 (U. S. C. Title 28, Section 347 (a)), and under Section 10 (a) of the Fair Labor Standards Act of 1938 (U. S. C. Title 29, Section 210 (a)).

IV. Statute Involved.

The statute under which the Administrator claims the power to prohibit homework is Section 8 (f) of the Fair Labor Standards Act of 1938 (Act of June 25th, 1938, Chapter 676, Section 8; 52 Stat. 1060; U. S. C. Title 29, Section 208 (f)).

The relevant provision is:

“(f) Orders issued under this section shall define the industries and classifications therein to which they are

to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."

V. Questions Presented.

The following three questions are presented by this proceeding:

1. Is the Administrator empowered by Section 8 (f) of the Fair Labor Standards Act of 1938 to prohibit homework as a "term and condition" of a wage order, notwithstanding the legislative history and the context of the section?

2. If such power is conferred by the statute, was the delegation thereof restrained by adequate standards to effect a constitutional delegation of legislative power?

3. May the Congress, notwithstanding the Fifth Amendment, prohibit the employment of homeworkers under the Commerce Clause solely because of the inability to enforce the minimum wage rate applicable to homeworkers, without regard to the social and economic character of such employment?

VI. Reasons for Allowance of Writs.

1. *The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.*

A. The Circuit Court of Appeals for the Second Circuit has construed Section 8 (f) of the Fair Labor Standards Act of 1938 to mean that the Administrator may prohibit industrial homework as a "term and condition" of an administrative wage order. This Court has not yet con-

strued that section of the Act with reference to the Administrator's power to prohibit homework.

The serious consequences of that feature of the wage order which prohibits homework are set forth in the concurring majority opinion of L. Hand, as follows (R. 242):

"And yet the regulation will disorganize and make over the industry, break up much family economy, and produce conditions which cannot possibly adjust themselves until after it has itself ceased to exist, when by hypothesis all will be free to go back to homework."

JUDGE SWAN in his dissenting opinion stated that the action taken by the Administrator was "so radical as to alter the whole structure of an industry and cause one-third of the employees engaged therein to become factory workers or to give up their employment" (R. 245).

The answer to the questions herein presented will affect not only the thousands of employees in the embroideries industry and their employers, but also may affect the rights of homeworkers and their employers in all other industries throughout the United States, wherein homework is practiced as a method of industrial production. Indeed, the decision of the Court below as to the scope of the Administrator's powers under Section 8 (f) may be applied by the Administrator as a precedent for prohibiting other occupations, industries and activities wherein the enforcement of the wage order is considered by him to be unattainable.

The public importance of the question is therefore obvious; and in such case, where an interpretation of an important provision of a federal statute and the powers of a federal Administrator thereunder are involved, and where a decision with regard to its enforcement constitutes a precedent of general application, this Court will grant a

writ of certiorari. *Del Vecchio v. Bowers*, 295 U. S. 281, 285.

B. The decision of the Court below also involves the question, which has not been decided by this Court, whether the Administrator may prohibit homework in those industries where the minimum wage rate is fixed by Section 6 of the Act ("statutory wages") and not by administrative wage orders under Section 8 ("committee wages").

JUDGE L. HAND stated that his ultimate decision that Section 8 (f) conferred power on the Administrator to prohibit homework in connection with "committee wages" as a "term and condition" of a wage order, was based on his determination that Section 8 (f), notwithstanding that it was expressly limited to "Orders issued under this section", also conferred the power to prohibit homework in connection with "statutory wages" established by Section 6. He said, "Indeed, unless it can be read to cover 'statutory wages', I do not believe it would justify the proscription of a substantial part of the entire industry" (R. 241-242).

This unsettled question of the Administrator's power to prohibit homework with respect to the mandatory statutory wage rates established by Section 6 is of importance in the administration of the Fair Labor Standards Act and should be determined by this Court.

C. The Circuit Court's decision involved a consideration of the Commerce Clause and the Fifth Amendment. In sustaining the prohibition of homework solely because of the Administrator's inability to maintain the minimum wage rate as to homeworkers, and not because of the social or economic aspects thereof (R. 81), the Court below, in effect, held that the prohibition of homework did not constitute an unreasonable exercise of the power con-

ferred by the Commerce Clause nor a violation of the Fifth Amendment. The precise question as to whether an occupation may be prohibited solely because of the inability to enforce a law applicable thereto, without regard to the social or economic character of such occupation, has not been but should be settled by this Court.

2. *The Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of this Court.*

A. AS TO STATUTORY CONSTRUCTION. In the course of the legislative history of the Act, Congress rejected proposed amendments containing provisions that administrative orders thereunder may contain "terms and conditions (including the restriction and prohibition of industrial homework or of such other acts or practices)", and omitted this parenthetical clause from the Act as finally enacted (Congressional Record, Volume 83, Part 7, pages 7373, 7376—Section 8 (6); Congressional Record, Volume 82, Part 2, pages 1511, 1514, 1574, 1583—Section 9 (6)). The provision was omitted, notwithstanding that the Secretary of Labor had urged that the Act contain a specific provision prohibiting homework. (Joint hearings before the Committee on Education and Labor of the Senate, and the Committee on Labor, House of Representatives, 75th Cong., 1st Session S. 2475 and H. R. 7200, at page 184.)

The Court below, in refusing to consider the deletion of the above mentioned parenthetical phrase as indicating Congressional intent to withhold the power therein mentioned, failed to follow the rule established by this Court in *Cudahy Packing Co., Ltd. v. Holland, Administrator of the Wage and Hour Division*, 315 U. S. 357, 366; *Maurer v. Hamilton*, 309 U. S. 598, 613; *U. S. v. Delaware & Hudson Co.*, 213 U. S. 366, 414; *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U. S. 184, 198.

This Court, in the above cases, held that the rejection by Congress of a provision of proposed legislation, and the omission of such provision from the final enactment, indicates legislative intent that the general words of the enacted statute shall not be deemed to include the effect of the rejected provision.

Insofar as the Circuit Court's ruling was based on the contention that the above mentioned parenthetical phrase relating to the prohibition of homework was omitted from the Fair Labor Standards Act to prevent the examples given in the parenthetical phrase from being taken as an "exhaustive" list of the powers granted, it is contrary to the rulings of this Court in *Phelps Dodge Corp. v. National L. R. B.*, 313 U. S. 177, 189 and *Fed. Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U. S. 95, 100.

B. AS TO DELEGATION OF LEGISLATIVE POWER. The Circuit Court's ruling that the powers conferred by Section 8 (f) were constitutionally delegated is contrary to the decisions of this Court in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 417, 418, 430; *Schechter v. U. S.*, 295 U. S. 495, 529-530, 539-540, 573. Those cases clearly held that a delegation of power unrestrained as to its exercise by adequately prescribed standards is unconstitutional. The Act does not prescribe the standards to be followed in the exercise of the powers delegated by Section 8 (f).

Circuit Court Judge FRANK refused to follow these cases. His opinion, stating that "these two cases must be considered exceptional, restricted to their particular or very similar facts" (R. 227), virtually attempts to overrule these decisions of this Court.

Conclusion.

It is respectfully submitted that this petition for writs of certiorari to review the orders and decrees of the United

States Circuit Court of Appeals for the Second Circuit, should be granted, and the orders and decrees of the Circuit Court should be reversed.

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DIVISION, UNITED STATES DEPARTMENT OF LABOR.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I. Opinions of Court Below.

The majority opinion of United States Circuit Court Judge Frank is printed (R. 211-241). The concurring opin-

ion of Judge L. Hand is printed (R. 241-243). The dissenting opinion of Judge Swan is printed (R. 243-246).

The opinions have not yet been printed in the official reports.

II. Jurisdiction.

The statutory provisions sustaining the jurisdiction of this Court to review the decision of the United States Circuit Court of Appeals for the Second Circuit are Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347 (a)), and Section 10 (a) of the Fair Labor Standards Act of 1938 (U. S. C. Title 29, Section 210 (a)).

Date of Entry of Order and Decree to Be Reviewed.

The orders and decrees to be reviewed was filed on July 27, 1944 (R. 246-247-248). The petition is timely within the requirements of Section 243 of the Judicial Code of the United States (U. S. C. Title 28, Section 350).

III. Statement of the Case.

A summary statement of the facts has already been made in the preceding petition for certiorari, pages 2-3, which is hereby adopted and made a part of this brief.

IV. Specification of Errors to Be Urged.

The United States Circuit Court of Appeals for the Second Circuit erred:

(1) In entering its order and decree affirming in all respects the wage order of the Respondent which prohibited, with limited exceptions, the performance of homework in the embroideries industry.

(2) In ruling that Section 8 (f) of the Fair Labor Standards Act of 1938 empowered the Administrator to pro-

hibit industrial homework in the embroideries industry as a "term and condition" of a wage order.

(3) In ruling that the power delegated to the Administrator by Section 8 (f) was restrained by adequate standards to effect a constitutional delegation of legislative power.

(4) In ruling that the prohibition of homework, imposed solely because of the Administrator's inability to enforce the minimum wage rate as to homeworkers, does not violate due process.

V. Summary of Argument.

A. The Fair Labor Standards Act of 1938 did not, either expressly or impliedly, confer upon the Administrator the authority to make the wage order herein prohibiting homework.

B. If the Act, by implication, intended to confer unrestrained power on the Administrator to prohibit industrial homework, there was an unconstitutional delegation of legislative power.

C. The prohibition of industrial homework solely because of the Administrator's inability to enforce the wage rate as to homeworkers violates the Fifth Amendment of the Constitution.

VI. Argument.

A. The Fair Labor Standards Act of 1938 did not, either expressly or impliedly, confer upon the Administrator the authority to make the wage order herein prohibiting homework.

(1) The legislative history of the Act established Congressional intent to withhold from the Administrator the

power to prohibit homework. The decision of the Court below to the contrary is in conflict with the applicable decisions of this Court.

The respondent claims the power to prohibit homework as a "term and condition" of his wage order by virtue of Section 8 (f) (R. 73). The legislative history of this section clearly indicates that Congress withheld this power from the Administrator.

Brief Statement of Legislative History of Section 8 (f).

The section of the proposed amended Senate Bill #2475, from which Section 8 (f) was derived, originally read as follows (Congressional Record, Vol. 83, Part 7, Pages 7373, 7376—Section 8(6); Vol. 82, Part 2, Pages 1511, 1514; 1574, 1583—Section 9(6)) *

"A labor standard order . . . (6) shall contain such terms and conditions (including the restriction or prohibition of industrial homework or of such other acts or practices) as the Board * finds necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, or to safeguard the fair labor standards therein established."

The amendment to Senate Bill #2475 containing the above parenthetical provision was rejected by the House Committee on Labor (Congressional Record, Vol. 83, Part 7, Page 7378, last paragraph, first column; 7373, first paragraph, second column); was rejected by the House of Representatives (Congressional Record, Vol. 83, Part 7, Page 7389); and in the final measure the comparable provision with respect to wage orders, namely, Section 8 (f), omitted the parenthetical clause "(including the restriction and

* Section 9(6) of the Amendment reads "Administrator" instead of "Board."

prohibition of homework * * *)” as a modifier of the words “terms and conditions”.

This parenthetical clause authorizing the prohibition of homework was rejected by Congress, notwithstanding that Secretary of Labor Perkins had urged its inclusion in the Act in express terms. (Printed testimony of Joint Committee Hearings, Op. Cit. Pages 184, 195.)

**The Decision of the Court Below Is Inconsistent with the
Decisions of This Court.**

The ruling of the Court below that rejection of the parenthetical clause relating to homework and its exclusion from the Fair Labor Standards Act of 1938 did not indicate the intention of Congress to withhold from the Administrator the power to prohibit industrial homework is in conflict with the following applicable decisions: *Cudahy Package Co. Ltd. v. Holland*, 315 U. S. 357, 362 (fn. 3), 366; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 414; *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 198; *Boston Sand & Gravel Co. v. United States*, 278 U. S. 41, 48; *Maurer v. Hamilton*, 309 U. S. 598, 613.

According to the well established rule of statutory construction established by this Court in the above cases the rejection or exclusion of provisions by Congress in the final enactment of legislation indicates its intention that the enacted provisions be not deemed to include the effect of the provisions rejected. See *Keystone Mining Co. v. Gray* (CCA 3d) 120 Fed. (2d) 1, 9-10.

Mr. Chief Justice Stone, in *Cudahy Packing Co. Ltd. v. Holland*, supra, pointed out that a provision of the same Senate Bill #2475 permitting delegation of the Administrator's power of subpoena was excluded from the final enactment. The Chief Justice stated, at page 366 of the

Opinion, that the Congressional intent to withhold from the Administrator authority to delegate this power was indicated "by the legislative history of the present Act which shows that the authority to delegate the subpoena power was eliminated by the Conference Committee from the bills which each House had adopted".

In *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 403-404, 414 Mr. Justice White ruled that the words "any interest, direct or indirect" in the commodities clause of the Hepburn Act of 1906, prohibiting railroad companies from transporting commodities "in which it may have an interest, direct or indirect" did not embrace stock ownership by a railroad in a corporation producing coal, since an amendment in specific terms causing the clause to embrace stock ownership was rejected by Congress in the course of its legislative history.

Judge Frank stated in his opinion in the Court below that the omission of the parenthetical clause which would have expressly conferred upon the Administrator the power to prohibit homework as a "term and condition" of a wage order, did not indicate an intent to eliminate such power from Section 8 (f) because the Conference report did not explain the reason for the omission (R. 221). The above decisions of this Court, however, clearly indicate that the very fact of such omission bespeaks the legislative design to exclude the power which the omitted provision would have conferred.

Judge L. Hand suggested a different explanation for the omission of the parenthetical clause. He attributes the omission solely to draftsmanship. He ascribes the omission to a desire to prevent the specifications within the parentheses from being taken as exhaustive and as limiting the generality of the words "terms and conditions" (R. 243).

The parenthetical phrase "including the restriction and prohibition of industrial homework" contained in the rejected amendment to Senate Bill #2475, if left in the Act, would not have limited the generality of the powers previously conferred, under the decisions of this Court in *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 189, and in *Federal Land Bank of St. Paul v. Bismark*, 314 U. S. 95, 100. In the latter case, Mr. Justice Murphy said "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." Consequently, the suggestion made by Judge Hand in the Court below that the phrase was omitted "lest the specifications be taken as exhaustive" must necessarily fall. The expedient of employing the phrase "without limiting the generality of the foregoing" was also available to an overcautious draftsman.

(2) The context of Section 8 (f) indicates that Congress did not grant authority to the Administrator to prohibit industrial homework as a "term and condition" of a wage order.

(a) The statutory minimum wage rates ("statutory wages") fixed by Section 6 of the Act become operative without the issuance of a wage order. The Administrator cannot prohibit homework as to "statutory wages" since there is no wage order to which he might attach "terms and conditions." Section 8 (f) expressly limits the Administrator's power to make "terms and conditions" to "Orders issued under this section." To interpret the words "terms and conditions" in Section 8 (f) as including the power to prohibit homework would therefore lead to the absurd, unfair and untenable conclusion that the Administrator has power to prohibit homework in those industries where the minimum wage rate is established

by wage order, although he clearly may not prohibit homework in those industries where the minimum wage rate is automatically established by Section 6.

Furthermore, in accordance with Section 8 (e), the Administrator's wage order prohibiting homework will expire on October 23, 1945. It would, therefore, be absurd to assume that Congress intended that the Administrator could make so disruptive but temporary a regulation as the prohibition of homework would entail (R. 241-242).

Judge L. Hand frankly admitted that unless Congress gave the Administrator power to prohibit homework with respect to "statutory wages," it would be absurd to conclude that Congress gave him such power as to "committee wages" (R. 241-242). He stated that he would disregard the explicit language of Section 8 (f) which confines the Administrator's power to make terms and conditions to "Orders issued under this section," and would hold it applicable to Section 6. This disregard of the precise and express language of the statute establishes the unsoundness of his decision.

Judge Frank disagreed with Judge Hand's contention that there was justification for disregarding the explicit language of Section 8 (f) and holding it applicable to the statutory wage rates established by Section 6. Judge Frank said that if the Act were inconsistent in giving the Administrator power to prohibit homework as to "committee wages" but not as to "statutory wages" that is an inconsistency which must be accepted (R. 223-224). In ruling that in spite of this inconsistency Section 8 (f) gave the Administrator power to prohibit homework as to "committee wages," Judge Frank disregarded the well established rule of statutory construction that a statute must be interpreted to avoid inconsistency, absurdity, and unequal or unfair results.

(b) The Act, in dealing with other labor practices in addition to the minimum wage rate, did so in specific terms, for example, child labor (Section 3 (l) of the Act). The express mention of child labor excludes the inference that the practice of homework was impliedly intended to be regulated or prohibited by the Act.

(c) The phrase "without substantially curtailing employment" recurs in Section 8 (a), (b), (c), (e) and by reference, in Section 8 (d), as a limitation on the powers therein conferred. Section 8 (f), however, does not contain this phrase. In view of its repeated and express mention in the other subdivisions of Section 8, it may not be assumed that the phrase is implied as a condition to the exercise of the powers conferred by Section 8 (f).

Consequently, the words "terms and conditions" were not intended to include the prohibition of homework. Certainly if so drastic an act were contemplated, as embraced in the words "terms and conditions," the powers of the Administrator would have been limited by the express limitation that the terms and conditions should be such as not to "substantially curtail employment." The absurd result of the Administrator's interpretation of Section 8 (f) is that the industry committee and the Administrator may not establish a wage rate if the wage rate curtails employment, but he may, as a "term and condition" of a wage order, prohibit homework even though such prohibition would in fact curtail employment. This absurdity is emphasized by the well known purpose of the Act—to prevent widespread unemployment. The words "terms and conditions," therefore, as used in Section 8 (f) may not be interpreted as including the drastic power of prohibiting homework.

B. If the Act, by implication, intended to confer unrestrained power on the Administrator to prohibit industrial

homework, there was an unconstitutional delegation of legislative power.

The only standard prescribed in the Act applicable to an exercise of the power conferred by Section 8 (f) thereof, is the requirement that the "terms and conditions" of a wage order be such as the Administrator finds necessary for its enforcement.

The inadequacy of the standard is apparent. The Act does not define or prescribe the circumstances upon which the Administrator must predicate his conclusion that the "terms and conditions" are necessary for enforcement of the wage order; nor is there a definition or measure of the extent of violation, "evasion or circumvention" which must exist in order to warrant the adoption of the so-called "terms and conditions".

For example, must twenty, fifty or one hundred percent of the firms in an industry be in violation to warrant the Administrator's incorporating a prohibition as a "term and condition" of a wage order. Similarly, for how short or long a period of time need violation be found to exist to authorize the use of the claimed power?

To further illustrate the inadequacy of standards, reference is made to the Administrator's annual reports to Congress for the fiscal years 1941 and 1943. There he reported that routine inspections by his department of varied industries revealed that:

of 23,431 establishments inspected in 1941, there were 71% found to be in violation of the Act (Annual Report for Fiscal year ending June 30th, 1941, page 106);

of 42,056 establishments inspected in 1943 in approximately 60 industries, there were 65% found to be in violation of the Act (Annual Report for Fiscal year ending June 30th, 1943, page 34).

These inspections did not involve homework establishments and were made as a routine departmental procedure not based on complaints; hence they are a valid indication of the extent of violations of the Act which exist generally.

The sole standard of necessity prescribed in the Act does not guide the Administrator in determining which of the industries mentioned in the above reports are to be subjected to an order of prohibition. Obviously this determination is relegated to the unrestrained discretion of the particular Administrator who may chance to hold the office when the power is exercised.

Such delegation of power comes within the condemnation of the decisions in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 417, 418, 430 and *Schechter v. U. S.*, 295 U. S. 495, 529-530, 537, 539-540, as an unfettered delegation of power.

These cases have not been overruled or limited in their application, the decision of Circuit Court Judge Frank to the contrary notwithstanding. In fact the *Schechter* case, supra, was cited and considered by this Court as recently as March 27, 1944 in the case of *Yackus v. U. S.*, 64 Sup. Ct. 660, 667.

The absence of adequate standards in Section 8 (f) can not be remedied by applying to it the declared policies of Section 2 and the standards prescribed in Section 8, as suggested by Judge Frank in the Court below. This is so because there is no legislative command that the Administrator comply with the standards prescribed in Section 8 or the policies or objectives specified in Section 2 as a prerequisite to exercise of power by him under Section 8.

This Court, in *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 144 said:

"The mandate of the Constitution that all legislative powers granted 'shall be vested' in Congress has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as

fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of Congressional policy, have been made *prerequisite* to the operation of its statutory command. The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitutional sense, of the legislative function."

C. The prohibition of industrial homework, solely because of the Administrator's inability to enforce the wage rate as to homeworkers, violates the Fifth Amendment of the Constitution.

Petitioners question the power of Congress itself to prohibit homework solely because of inability to enforce the wage rate.

Petitioners recognize the general rule that the power of Congress over interstate commerce is complete in itself and acknowledges no limitations other than those prescribed in the Constitution. *U. S. v. Wrightwood Dairy*, 315 U. S. 110, 119; *Wickard v. Filburn*, 317 U. S. 111, 124.

Where exercise of the power under the Commerce Clause invades the rights protected by the Fifth Amendment, the invasion will be sustained unless the exercise of such power has no real and substantial relation to the object sought to be attained, *North American v. Securities & Exchange*, 135 Fed. (2d), 148, 154 (cert. granted 318 U. S. 750) or is arbitrary or unreasonably discriminatory. *Currin v. Wallace*, 306 U. S. 1, 14.

In the instant case, the prohibition of homework would frustrate the very objective of the Act, namely, the safeguarding of a minimum wage rate for homeworkers as well as for other employees intended to be benefited by the Act.

The determination in the present case as to whether the prohibition of homework is arbitrary and unreasonably discriminatory must be made in the light of the Administrator's annual report of 1943 (Annual Report, Wage and Hour and Public Contract Division, U. S. Department of Labor, For the Fiscal Year Ending June 30th, 1943, page 34). There, he reported that 65% of the establishments in sixty industries voluntarily inspected by him were found to be in violation of the Act. Homework establishments were not involved in this inspection. From this report, it appears that there is a substantial inability to enforce the Act as to industry in general.

Imposing a prohibition as to one industry because of an inability to enforce a minimum wage rate therein, when the same inability to enforce prevails in sixty industries to which prohibition has not been applied, is obviously unreasonable discrimination.

Since the Administrator acknowledged that he was not concerned with the economic or social aspects of homework (R. 81), the Administrator may not now justify the prohibition on social or economic grounds.

Consequently, since the prohibition cannot be justified on social or economic grounds, and since it involves unreasonable discrimination, and its exercise will frustrate the very purpose of the Act, it should be declared to be an improper invasion of the rights safeguarded by the Fifth Amendment.

Conclusion.

It is respectfully submitted that the petition herein for writs of certiorari to review the orders and decrees of the United States Circuit Court of Appeals for the Second Circuit should be granted, and that the said orders and decrees be reversed, and that the Wage Order of the Respond-

ent be modified by setting aside those provisions thereof which prohibit and restrict homework.

Respectfully submitted,

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